

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**HELEN L. HAWKEN**  
Claimant

VS.

**NORTH AMERICAN OPERATIONS  
FAIRFAX PLANT  
GENERAL MOTORS CORPORATION**  
Respondent  
Self-Insured

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Docket No. 206,786

**ORDER**

Respondent appealed the Award dated July 10, 1998, entered by Administrative Law Judge Julie A. N. Sample. The Appeals Board heard oral argument in Kansas City, Kansas, on February 16, 1999.

**APPEARANCES**

Philip R. Carson of Kansas City, Kansas, appeared for the claimant. Sean B. Summers of Kansas City, Missouri, appeared for the respondent.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

**ISSUES**

This is a claim for a November 8, 1994 accident. The Judge awarded claimant permanent partial general disability benefits based upon a 25½ percent whole body functional impairment.

Respondent contends that the Judge erred by awarding claimant any compensation in this claim as the injury allegedly would not have occurred "but for" a preexisting back condition. Alternatively, respondent argues that 50 percent of claimant's ultimate

impairment preexisted the November 1994 accident and, therefore, 50 percent of the ultimate impairment should be deducted in determining claimant's award.

The issue now before the Appeals Board is whether the award should be reduced for a preexisting condition which was neither symptomatic nor disabling and which before the work-related accident would not have constituted an impairment under the AMA Guides.

#### **FINDINGS OF FACT**

After reviewing the entire record, the Appeals Board finds:

- (1) Ms. Hawken injured her back while working for General Motors Corporation on November 8, 1994. The parties stipulated that the accident arose out of and in the course of her employment.
- (2) Because she has returned to work for General Motors, Ms. Hawken is claiming permanent partial general disability benefits based upon her functional impairment rating only.
- (3) As a result of the injury, Ms. Hawken underwent two back surgeries. In February 1995, Ms. Hawken underwent a bilateral L4-5 laminotomy, medial facetectomy, foraminotomy, decompression of the cauda equina and bilateral L-5 nerve roots, and bilateral L4-5 posterolateral fusion with bone graft and instrumentation. Because her surgeon questioned whether she was properly healing, Ms. Hawken underwent a second back surgery in September 1995. At that time the doctor performed an anterior lumbar fusion at the L4-5 intervertebral level.
- (4) One of Ms. Hawken's surgeons, board certified orthopedic surgeon David K. Ebelke, M.D., believes Ms. Hawken now has a 26 percent whole body functional impairment as the result of the work injury and surgery. He attributed 15 percent to the fusion with instrumentation and bone grafting, 10 percent for the surgically treated disc herniation, and included 2 percent for the second operation. In formulating the functional impairment rating, Dr. Ebelke considered the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides) and his experience. He testified that his rating would not change whether it was under the Third Edition (Revised) or the Fourth Edition of the Guides.
- (5) At her attorney's request, in October 1997 Ms. Hawken saw board certified orthopedic surgeon Edward J. Prosic, M.D., for evaluation. He rated Ms. Hawken as having a 22 to 25 percent whole body functional impairment without using the AMA Guides and as having a 33 percent impairment using the Guides.

(6) Before the November 1994 accident, Ms. Hawken was unaware she had spondylolisthesis and spinal stenosis in her lumbar spine. The conditions were asymptomatic and neither impaired nor disabled her. Although she had experienced back pain in September 1994, her symptoms had resolved before the November 1994 accident.

(7) The Judge found Ms. Hawken's functional impairment rating to be 25½ percent. After considering the ratings provided by the doctors, the Appeals Board adopts the Judge's finding.

(8) The Board adopts the Judge's remaining findings and conclusions to the extent they are not inconsistent with the above.

#### CONCLUSIONS OF LAW

(1) The Award should be affirmed.

(2) Every natural and direct consequence that flows from a compensable injury is also compensable under the Workers Compensation Act.<sup>1</sup>

(3) Before July 1, 1993, when a preexisting condition was aggravated by a work-related accident, the worker was entitled to receive compensation for the entire disability without apportionment.<sup>2</sup> But that rule was somewhat changed by the 1993 Legislature when it amended K.S.A. 44-501(c) to provide that an award would be reduced by the amount of preexisting functional impairment.

(4) Because hers is an "unscheduled" injury, Ms. Hawken's permanent partial general disability is determined by K.S.A. 44-510e. That statute provides:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in

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<sup>1</sup> Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

<sup>2</sup> Woodward v. Beech Aircraft Corp., 24 Kan. App. 2d 510, 949 P.2d 1149 (1997); Claphan v. Great Bend Manor, 5 Kan. App. 2d 47, 611 P.2d 180, *rev. denied* 228 Kan. 806 (1980).

excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Because Ms. Hawken has returned to work for General Motors presumably earning a comparable wage, she is claiming permanent partial general disability benefits based upon her functional impairment only, which the Judge and Board have determined to be 25½ percent.

(5) There is no reduction for preexisting functional impairment as there was none. Unknown underlying conditions that are neither symptomatic, nor disabling, nor otherwise constitute an impairment under the AMA Guides are not to be deducted from an award as required by K.S.A. 44-501(c).

### **AWARD**

**WHEREFORE**, the Appeals Board affirms the Award dated July 10, 1998, entered by Administrative Law Judge Julie A. N. Sample.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Philip R. Carson, Kansas City, KS  
Sean B. Summers, Kansas City, MO  
Julie A. N. Sample, Administrative Law Judge  
Philip S. Harness, Director